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No. 85-1886

In the Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES, ET AL., APPELLANTS

v.

CONSTANCE J. HORNER, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether Congress's rescission in December 1985 of the automatic cost-of-living increase in federal civil service retirement benefits that was scheduled to be paid beginning in January 1986 resulted in a taking of private property without just compensation, in violation of the Fifth Amendment.

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MOTION TO AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, the Solicitor General, on behalf of the Director of the Office of Personnel Management and the other appellees, moves that the judgment of the three-judge district court be affirmed.

OPINION BELOW

The opinion of the district court (J.S. App. 1a-10a) is reported at 633 F. Supp. 511.

JURISDICTION

The judgment of the district court (J.S. App. 11a-12a) was entered on April 17, 1986. The notice of appeal to this Court was filed on April 23, 1986 (J.S. App. 13a), and the jurisdictional statement was filed on May 16, 1986. The jurisdiction of this Court is invoked under Section 274(b) of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1098.

STATEMENT

1. The Civil Service Retirement Act, codified at 5 U.S.C. (& Supp. II) 8331-8348, provides for the payment of retirement, disability, and survivor benefits to federal civil service employees and certain of their family members. Under that Act, Congress has established a Civil Service Retirement and Disability Fund in the Treasury and appropriated monies in the Fund for the payment of benefits and related administrative expenses (5 U.S.C. 8348(a)(1)). A mandatory contribution to the Fund (typically 7% of salary) is deducted from the pay of each covered employee, and that contribution is matched by the employing agency (5 U.S.C. 8334(a)). Any costs of the retirement program that are not covered by these contributions are financed out of general revenues in the Treasury (5 U.S.C. 8348(f) and (g)). The Office of Personnel Management (OPM) is responsible for administering the retirement program (5 U.S.C. 8347(a)), and OPM in turn appoints a Board of Actuaries to advise and assist it (5 U.S.C. 8347(f)). One of the responsibilities of the Board of Actuaries is to recommend to OPM and Congress "such changes as in the Board's judgment are necessary to protect the public interest and maintain the System on a sound financial basis" (*ibid.*).

The amount of benefits payable under the Act is typically computed according to a formula based on the retiree's years of service and the average of his three highest annual rates of pay (5 U.S.C. (& Supp. II) 8331(4), 8339). Over the years, general increases in federal salaries and other factors have resulted in benefit levels that far exceed employee contributions to the Fund. In fiscal year 1980, for example, employees contributed $3.6 billion, while the total cost of benefits and administrative expenses for the year totalled $14.9 billion. OPM, *Fiscal Year 1984 Com-*

pensation Report 37 (1986). Similarly, in fiscal year 1985, employees contributed only $4.5 billion, while expenses exceeded $23.1 billion (J.S. App. 3a).

A substantial portion of the increase in the cost of the retirement program is attributable to cost-of-living adjustments to benefit levels, commonly known as COLAs.[1] Beginning with the Postal Service and Federal Employees Salary Act of 1962, Pub. L. No. 87-793, § 1101(b), 76 Stat. 869, federal retirees' annuities have been automatically adjusted to reflect increases in the Consumer Price Index (CPI). However, Congress has amended the COLA formula many times since 1962. Initially the changes made the COLA more generous,[2] but recent amendments have reduced the COLA or delayed its payment date in order to control the costs of the retirement program.[3]

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[1] "[T]he most costly feature of [the retirement program] is the full adjustment of benefits for annual changes in the Consumer Price Index * * *." CRS, Library of Congress, 97th Cong., 1st Sess. *Restructuring the Civil Service Retirement System: Analysis of Options to Control Costs and Maintain Retirement Income Security* 1 (Comm. Print 1982), (report prepared for the Subcomm. on Civil Service, Post Office, and General Services of the Senate Comm. on Governmental Affairs).

[2] In 1969, for example, Congress provided for an increase in the annuity of 1% (commonly referred to as the "kicker") over and above the CPI-based increase in the COLA itself (Pub. L. No. 91-93, § 204(a), 83 Stat. 139).

[3] In 1976, Congress rescinded the 1% "kicker" enacted in 1969 (see note 2, *supra*). Pub. L. No. 94-440, § 1306(a), 90 Stat. 1462. In 1981, Congress provided that COLA adjustments were to be made only once, rather than twice, each year (Pub. L. No. 97-35, § 1702(a), 95 Stat. 754). In 1982, Congress reduced the COLA for non-disabled retirees for fiscal years 1983 through 1985 and postponed by one month each year the date on which the COLA would become effective (Pub. L. No. 97-253, § 301(a), 96 Stat. 790-791).

In 1984, as part of further cost-containment measures, Congress delayed the effective date of the COLA to December of each year[4] and altered the base period of calculation (Pub. L. No. 98-270, § 201(a), 98 Stat. 157, codified at 5 U.S.C. (Supp. II) 8340(b)).[5] As amended, 5 U.S.C. (Supp. II) 8340(b) provides that, "effective December 1 of each year, each annuity payable from the Fund * * * shall be increased by the percent change in the price index * * *." A retiree's benefits are stated in the form of an annuity, which is paid in monthly installments beginning "on the first business day of the month after the month or other period for which it has accrued" (5 U.S.C. 8345(a)). By operation of the 1984 amendments and as a result of an increase in the CPI, a COLA of 3.1% became "effective" on December 1, 1985, and was to be reflected in monthly payments beginning January 2, 1986 (J.S. App. 2a-3a).

2. However, before annuity payments were increased on January 2, 1986, the President, on December 12, 1985, signed the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 *et seq.* That Act, which was passed in response to "fiscal and economic problems of unprecedented magnitude" (*Bowsher* v. *Synar*, No. 85-1377 (July 7, 1986), slip op. 20), mandates progressively lower "maximum deficit amounts" for federal spending for fiscal years 1986 through 1991 (§ 201(a), 99 Stat. 1039). The Act requires

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[4] Prior to the 1984 amendments, the COLA for 1985 was scheduled to go into effect in June. See 5 U.S.C. 8340(b); Pub. L. No. 97-253, § 301(b), 96 Stat. 791.

[5] Under the 1984 amendments, the COLA is calculated on the basis of the increase in the CPI for the third quarter of the current year as compared with the CPI for the third quarter of the preceding year. Prior to the amendments, the base period was the entire calendar year. See 5 U.S.C. (Supp. II) 8340(b); H.R. Rep. 98-425, 98th Cong., 2d Sess. 8 (1984).

the President to issue an order "sequestering" a uniform percentage of budget and spending authority for most federal programs in any year in which it is estimated that the budget deficit will exceed the maximum deficit amount by more than a specified sum. See *Synar*, slip op. 2-3. The Directors of the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) are responsible for estimating the deficit for the next fiscal year. If the anticipated deficit will exceed the deficit target for that year by more than a specified amount, the Directors must prepare a report calculating the necessary budget reductions (§ 251(a)(1) and (2), 99 Stat. 1063-1064). Under the statutory scheme as implemented for fiscal year 1986, the Directors of OMB and CBO submitted their report to the Comptroller General (§ 251(a)(2), 99 Stat. 1064), who then submitted his own report to the President specifying the required reductions in federal spending. The President's sequestration order in turn was required to conform to the Comptroller General's report (§ 252(a)(1), 99 Stat. 1072).

In addition to establishing procedures for the effectuation of spending reductions generally, Congress also prescribed special rules governing "automatic spending increases" (such as the COLA at issue here) in fiscal year 1986 and in subsequent years (§ 252(a)(6)(C), 99 Stat. 1075). Section 252(a)(6)(C)(i), 99 Stat. 1075, which applies to fiscal year 1986, provides that any automatic spending increase that would have been "first paid" after the date of enactment of the Balanced Budget and Emergency Deficit Control Act—*i.e.*, after December 12, 1985—"shall be suspended." Such suspensions were to remain in force until a sequestration order issued by the President for fiscal year 1986 became effective (*ibid.*). The enactment of this provision had the effect of suspending the COLA that had been scheduled to be paid beginning on January 2, 1986.

Section 252(a)(6)(C)(i) of the Act further provides that if a Presidential sequestration order directed that automatic spending increases be reduced to zero, then the automatic spending increases for fiscal year 1986 "shall be permanently cancelled." On February 1, 1986, on the basis of the Comptroller General's report, the President issued a sequestration order requiring reductions in federal spending for fiscal year 1986 (51 Fed. Reg. 4291). This sequestration order, which became effective on March 1, 1986 (§ 252(a)(6)(A), 99 Stat. 1075; 51 Fed. Reg. 4292), resulted in the permanent cancellation of the COLA for federal retirees that would have been paid beginning January 2, 1986. See *Synar*, slip op. 3.

3. This suit was filed in the United States District Court for the District of Columbia on December 20, 1985, by the National Association of Retired Federal Employees (NARFE), its officers, and four retired federal employees, all of whom are appellants in this Court. Appellants sought a declaratory judgment that under 5 U.S.C. (Supp. II) 8340(b), the 3.1% COLA became the private property of NARFE's members on its effective date of December 1, 1985, and that the suspension (and subsequent cancellation) of the COLA by operation of the Balanced Budget and Emergency Deficit Control Act constituted a taking of that private property without just compensation, in violation of the Fifth Amendment.

In a decision dated April 17, 1985, the district court rejected appellants' constitutional challenge, concluding that "[t]he law is so clear and consistent that [appellants] must be judged to have not the shadow of a case" (J.S. App. 9a).[6] The court found the instant litigation to be controlled by *Stouper* v. *Jones*, 284 F.2d 240 (D.C. Cir. 1960), which, relying on *Flemming* v. *Nestor*, 363 U.S. 603 (1960), held that a retiree has no vested right to an annuity under the Civil Service Retirement Act. See J.S. App. 5a-7a. Because those decisions would permit Congress to

[6] The case was heard by three judges, as required by Section 274(a)(5) of the Act, 99 Stat. 1098.

decrease a retiree's underlying annuity at any time, the district court concluded, there is "no reason why [Congress] cannot increase the rate at which the annuity is calculated [by operation of the automatic COLA] and then decrease it again before payment" (*id.* at 7a). The court noted that Congress has revised the statutory COLA provisions on a number of occasions, thereby manifesting an intent that the Civil Service Retirement Act should not be construed to confer vested property rights, and that the courts have sustained such revisions (*id.* at 7a-8a (citing *Zucker* v. *United States*, 758 F.2d 637 (Fed. Cir. 1985), cert. denied, No. 85-6 (Oct. 7, 1985), and *National Treasury Employees Union (NTEU)* v. *Devine*, 591 F. Supp. 1143 (D.D.C. 1984)). Against this background, the court found the language of the statutory COLA provisions to fall far short of the compelling evidence of congressional intent that would be necessary to overcome the presumption that a law providing for the payment of pension benefits " 'is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise' " (J.S. App. 8a-9a, quoting *Dodge* v. *Board of Education*, 302 U.S. 74, 79 (1937)).

4. After the district court had rendered its decision, this Court held in *Synar* that the automatic deficit reduction process prescribed by the Act is unconstitutional under the doctrine of separation of powers because it assigns executive functions to the Comptroller General, an officer removable by Congress. The Court therefore affirmed the judgment and order of the three-judge district court in that case (slip op. 20), which, inter alia, had held that the President's sequestration order of February 1, 1986, was "without legal force and effect" (*Synar* v. *United States*, 626 F. Supp. 1374, 1404 (D.D.C. 1986)).[7]

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[7] Pursuant to Section 274(e) of the Act (99 Stat. 1099), the district court's judgment and order in *Synar* had been automatically stayed pending appeal to this Court (626 F. Supp. at 1404; J.S. App. 4a n.1).

Absent subsequent action by Congress, the Court's judgment of affirmance in *Synar* would have had the effect of rescinding the permanent cancellation of the 1986 COLA that resulted from the President's sequestration order.[8] However, this Court stayed its judgment in *Synar* for 60 days in order to permit Congress to implement the "fallback" deficit reduction mechanism provided for in Section 274(f) of the Act, 99 Stat. 1100. See *Synar*, slip op. 3, 19-20.[9] On July 31, 1986, prior to the expiration of the 60-day stay entered by this Court, the President signed into law Pub. L. No. 99-366, 100 Stat. 773, which "ratifies and affirms as law the February 1, 1986, sequestration order of the President as issued under Section 252(a)(1) of the Balanced Budget and Emergency Deficit Control Act of 1985". See 132 Cong. Rec. H4576-H4582, S9280-S9284 (daily ed. July 17, 1986). This action by Congress was intended to ratify the permanent cancellation of the COLA that had resulted from the sequestration order. See *id.* at S9281 (remarks of Sen. Domenici); *id.* at H4580 (remarks of Rep. Barnes).[10]

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[8] The district court's judgment and order in *Synar* (and therefore this Court's affirmance of that judgment and order) did not affect the *suspension* of the COLA that was mandated by Section 252(a)(6)(C)(i) upon its enactment. Accordingly, that suspension would have remained in effect until the end of fiscal year 1986 even in the absence of the subsequent action by Congress that we discuss in the text. See J.S. App. 4a n.1; *Synar* v. *United States*, 626 F. Supp. at 1381 n.5.

[9] Under the fallback mechanism, the report prepared by the Directors of OMB and CBO (see page 5, *supra*) is submitted to a special joint committee of Congress, which, within five days, must report to the House and the Senate a joint resolution setting forth the contents of the Directors' report. The joint resolution, if passed by Congress and signed by the President, is a substitute for the report that the Act provides for the Comptroller General to submit to the President as the basis for a sequestration order. See *Synar*, slip op. 3.

[10] In light of Congress's action, this Court's mandate in *Synar* issued on August 26, 1986.

ARGUMENT

The decision of the district court rejecting appellants' constitutional challenge to the suspension and cancellation of federal retirees' cost-of-living adjustment for 1986 is based on a correct application of settled legal principles that confirm the power of Congress and the state legislatures to modify statutory benefit programs. Moreover, although appellants present a constitutional challenge, they concede (J.S. 5, 7, 9) that this case at bottom presents a question of statutory construction: whether Congress intended the particular statutory provisions at issue to confer on civil service retirees a vested property right to receive a 3.1% COLA for the year 1986, which Congress could not rescind after December 1, 1985. The district court's holding that the relevant provisions of the Civil Service Retirement Act should not be so construed is consistent with other decisions interpreting that Act, including, in particular, its COLA provisions. Because this case raises what appellants concede (J.S. App. 10-11) to be a narrow question concerning the operation of the COLA provisions in the unique circumstances resulting from the timing of the enactment of the Balanced Budget and Emergency Deficit Control Act of 1985, it presents no issue of broad or recurring importance warranting plenary review by this Court.

1. Appellants contend that the scheduled increase in retirement benefits for 1986 that resulted from the operation of the statutory COLA provisions became the private property of civil service retirees on December 1, 1985. In appellants' view, Congress could not thereafter cancel the COLA, even though it was never paid, because the result would be a taking of retirees' private property without just compensation, in violation of the Fifth Amendment. This argument is without merit, because the relevant statutory

provisions did not vest in civil service retirees a contractual or property right to receive even the underlying retirement benefits, much less the COLA increase in those benefits.

In *Dodge* v. *Board of Education*, 302 U.S. 74 (1937), this Court held in the precise context of a statute providing for the payment of retirement benefits that "[t]he presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise" (*id.* at 79). The Court therefore sustained the constitutionality of a state statute that reduced to $500 the amount of an annuity under a prior law that provided that a retiree "shall be paid the sum of fifteen hundred dollars ($1,500) annually and for life from the date of such retirement" (*id.* at 76). As the Court recently explained in reiterating the rule of *Dodge*, this presumption "is grounded on the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state." *National Railroad Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451, 466 (1985). "Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body" (*ibid.*). Accord, *Bowen* v. *Public Agencies Opposed to Social Security Entrapment (POSSE)*, No. 85-521 (June 19, 1986), slip op. 10-11; *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 147-148 (1982).

Consistent with these principles, the Court uniformly has held that federal statutes establishing retirement and pension programs do not confer vested or contractual rights on the beneficiaries and that such programs therefore may be revised or repealed by subsequent legislation. See *Flemming* v. *Nestor*, 363 U.S. 603, 608-611 (1960) (rejecting Fifth Amendment challenge to elimina-

tion of Social Security benefits, holding that the statute did not create "accrued property rights"); *Richardson* v. *Belcher,* 404 U.S. 78, 81 (1971) ("the analogy drawn in *Goldberg* [v. *Kelly,* 397 U.S. 254 (1970),] between social welfare and 'property' * * * cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits"); *United States Railroad Retirement Board* v. *Fritz,* 449 U.S. 166, 174 (1980) ("railroad [retirement] benefits, like social security benefits, are not contractual and may be altered or even eliminated at any time"); *Hisquierdo* v. *Hisquierdo,* 439 U.S. 572, 575 (1979) (same); *United States* v. *Teller,* 107 U.S. 64, 68 (1882) ("No pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion."). Compare *Lynch* v. *United States,* 292 U.S. 571, 576-577 (1934).

The imperatives of such a rule in the context of the Social Security program were explained in *Flemming* v. *Nestor,* 363 U.S. at 610:

> That program was designed to function into the indefinite future, and its specific provisions rest on predictions as to expected economic conditions which must inevitably prove less than wholly accurate, and on judgments and preferences as to the proper allocation of the Nation's resources which evolving economic and social conditions will of necessity in some degree modify.
>
> To engraft upon the Social Security system a concept of "accrued property rights" would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands.

See also *POSSE*, slip op. 9-11; *Bowen* v. *Owens,* No. 84-1905 (May 19, 1986), slip op. 8. The same imperative of flexibility in the face of uncertain economic conditions

applies equally to the civil service retirement program, which serves essentially the same function as the social security program (albeit on more generous terms) insofar as retired federal employees are concerned. There accordingly is no reason to believe that Congress would have singled out the civil service retirement program for unique treatment by conferring vested or contractual rights to benefits.

Indeed, the settled principles of statutory construction discussed above preclude any such interpretation of the Civil Service Retirement Act. "The presumption * * * that such a law is not intended to create private contractual or vested rights" (*Dodge* v. *Board of Education,* 302 U.S. at 79) may be overcome only where the intent to do so is "clearly and unequivocally expressed" (*National Railroad Passenger Corp.* v. *Atchison, T. & S.F. Ry.,* 470 U.S. at 466). As the district court concluded (J.S. App. 8a-9a), however, there is no unequivocally expressed intent in the Civil Service Retirement Act to overcome the operative presumption. The Act does not, for example, provide for the execution of a written contract as the basis for an employee's or retiree's participation or entitlement. See *Dodge* v. *Board of Education,* 302 U.S. at 78-79; compare *Lynch* v. *United States,* 292 U.S. at 576-577. Instead, participation by federal employees is mandatory. Moreover, as under the Social Security program at issue in *Flemming* v. *Nestor,* "eligibility for benefits, and the amount of such benefits, do not in any true sense depend on contribution to the program * * *, but rather on the earnings record of the primary beneficiary" (363 U.S. at 609). Against this background, and applying the rationale of *Flemming* v. *Nestor,* the District of Columbia Circuit held 20 years ago that the civil service retirement program does not create vested or contractual rights and that Congress can rescind eligibility for benefits even after payment has commenced.

Stouper v. *Jones,* 284 F.2d 240 (1966). As the district court observed, *Stouper* "effectively decides the present case" (J.S. App. 5a-6a).[11]

2.a. Although *Flemming* v. *Nestor* and *Stouper* v. *Jones* sustained the authority of Congress to eliminate certain retirees' benefits altogether, Congress in this instance has not gone nearly so far. Rather, in enacting Section 252(a)(6)(C)(i) of the 1985 Act, Congress cancelled only a scheduled *increase* in the level of benefits that retirees theretofore had been receiving, leaving the pre-existing level of benefits intact. If, as we have shown, retirees have no vested or contractual right to receive the underlying benefits, it follows a fortiori that they have no such right to receive a cost-of-living increase in the amount of those benefits.

Moreover, even if some portion of the underlying benefits were thought to have certain constitutional protections in view of a retiree's previous contributions to the Retirement Fund, a retiree still would have no vested or contractual right to a cost-of-living increase, either before or after its effective date. The COLA provisions of the

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[11] The Social Security Act expressly reserves to Congress the right to "alter, amend, or repeal" any provision of that Act (42 U.S.C. 1304). This Court has observed, however, that 42 U.S.C. 1304 merely " 'makes express what is implicit in the institutional needs of the program' " (*POSSE*, slip op. 10 (quoting *Flemming* v. *Nestor,* 363 U.S. at 611)). The absence of such an express reservation of authority therefore does not undermine the operation of the presumption that a statute such as the Civil Service Retirement Act does not confer vested or contractual rights. In any event, the Civil Service Retirement Act also gives notice that Congress may revise the benefits program, because it directs the Board of Actuaries to recommend to OPM and Congress "such changes as * * * are necessary to protect the public interest and maintain the System on a sound financial basis" (5 U.S.C. 8347(f)). A comparable provision was contained in the 1920 statute that established the retirement system. Act of May 22, 1920, ch. 195, § 16, 41 Stat. 620.

Civil Service Retirement Act operate to increase benefit levels beyond those in effect when the employee retired. Because an individual does not contribute to the Retirement Fund after retirement, there is no contractual rationale that could suggest an indefeasible entitlement to post-retirement increases. Especially is that so in light of the fact that employee contributions now defer only a relatively minor portion of the overall costs of the retirement program. See pages 2-3, *supra.*

Appellants cite nothing in the text or legislative history of the COLA provisions to support a contrary construction of the Retirement Act. Significantly, when Congress enacted the COLA provisions in 1962, the rule had been "well-established" for "many decades" (*National Railroad Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. at 466) that a statute creating a pension or similar benefit program is presumed to state a legislative policy, not to confer vested rights. " '[I]t is always appropriate to assume that our elected representatives, like other citizens, know the law.' " *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran,* 456 U.S. 353, 379 (1982) (quoting *Cannon* v. *University of Chicago,* 441 U.S. 677, 696-697 (1979)). It therefore may be presumed that Congress would have included the requisite clear and unequivocal statement of intent in the COLA provisions themselves if it had desired to create vested or contractual rights to increased benefits.

Only four years after Congress had enacted the COLA provisions, the District of Columbia Circuit held in *Stouper* v. *Jones, supra,* that a retiree has no vested right even in the underlying civil service retirement benefits, and the court accordingly sustained the constitutionality of an Act of Congress that eliminated benefits for certain disability retirees. Since that time, Congress has amended the COLA provisions on a number of occasions (see page 3 *supra*); those amendments obviously reflect the view,

in accordance with *Flemming* v. *Nestor* and *Stouper* v. *Jones,* that retirees have no vested right to receive scheduled COLAs. Congress's suspension and eventual cancellation of the COLA for 1986 therefore were consistent with the pattern of its prior legislation in this area.[12] The district court's decision sustaining Congress's actions in that respect accords with other judicial decisions that have upheld similar COLA amendments. See *Zucker* v. *United States,* 758 F.2d 637 (Fed. Cir. 1985) (sustaining repeal of the 1% "kicker" in 1976), cert. denied, No. 85-6 (Oct. 7, 1985); *NTEU*, 591 F. Supp. at 1147 (sustaining 1981 amendment prescribing annual rather than semiannual COLAs and observing that there is no "protected property interest in the COLA benefits").

b. Appellants contend (J.S. 5-8) that this case should be treated as an exception to the general rules just outlined because Congress cancelled the COLA after December 1,

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[12] The House Report on the 1984 Act that postponed the effective date of the COLA from June to December 1985 (Pub. L. No. 98-270, § 201(a), 98 Stat. 157) summarized this legislative background as follows (H.R. Rep. 98-425, *supra,* at 361):

> The Civil Service Retirement System has been under attack since 1976 when Congress repealed the one-percent "kicker" which was added to each cost-of-living adjustment to compensate for the delay in receiving such an adjustment. Since then we have changed from twice-a-year to once-a-year COLA, restricted disability retirement benefits, increased interest rates on deposits for prior service, delayed the commencing date of annuities, required annuities to be rounded down to the next lowest dollar, temporarily provided one-half COLA for retirees under age 62, tightened requirements for early retirement eligibility, eliminated the so-called "look-back" benefit, and mandated prorating of initial COLAs. According to preliminary data * * * these retirement system changes have resulted in a total reduction in benefits of $6.7 billion since 1977.

1985, the date on which it had become "effective" under 5 U.S.C. (Supp. II) 8340(b). But appellants cite no evidence of legislative intent, and we are aware of none, that Congress's specification of an effective date was intended to create a private property right to an increased annuity. The presumption is that even the *substantive* provisions of a benefits statute do not create such rights. A fortiori that presumption must apply to the construction of an effective date provision. Accordingly, there is no basis for construing the reference in 5 U.S.C. (Supp. II) 8340(b) to December 1 as the date on which a COLA is to be "effective" to mean anything more than what a straightforward reading of its language suggests, namely, that December 1 is the triggering date for an increase in the level of retirement benefits to be reflected in checks issued the following month. The effective date provision, like all the other mechanical components of the statutory benefit scheme, "merely declares a policy to be pursued until the legislature shall ordain otherwise" (*Dodge* v. *Board of Education,* 302 U.S. at 79).[13]

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[13] Appellants argue (J.S. 7) that if the COLA at issue had not only become "effective" as of December 1, 1985, but had actually been paid to retirees as of that date, "the government surely could not have insisted that this increase be returned in the name of Gramm-Rudman's cost-saving purpose." Appellants are correct, because Congress specified in Section 252(a)(6)(C)(iii) of the Act that "no recoupment shall be made against an individual to whom payment was made." 99 Stat. 1076. Of course, even if the COLA for 1986 had actually been paid, Congress could have effectively recovered the payments by preventing a COLA from going into effect in 1987 or by reducing the underlying level of retirement benefits. By the same token, if the district court had found a taking as a result of the cancellation of the COLA for 1986 after its effective date, any COLA that Congress permitted to go into effect in 1987 or later years could be regarded as compensation for that taking. This demonstrates the attenuated nature of appellants' assertion of a vested right to the COLA for 1986.

This Court's decision in *United States* v. *Will,* 449 U.S. 200 (1980), relied upon by appellants (J.S. 5-8), in no way suggests a contrary result. That case did not involve a claim that scheduled benefit increases had become their prospective recipients' "private property," such that their cancellation by Congress was barred by the Just Compensation Clause of the Fifth Amendment. The *Will* case, rather, involved the Compensation Clause in Article III, Section 1 of the Constitution, which provides that the compensation of Article III judges may not be "diminished" during their tenure. Construing the latter clause, the Court in *Will* held that a salary increase for judges that became effective by operation of a statutory provision for automatic cost-of-living increases could not thereafter be rescinded by Congress (449 U.S. at 217-231). That holding has no bearing on the question presented here for at least two reasons. First, the holding in *Will* concerned salaries rather than pensions, which have traditionally been regarded as "the bounties of the government" (*United States* v. *Teller*, 107 U.S. at 68). Second, the Compensation Clause of Article III applies whether or not the judge's prospective compensation (and therefore any scheduled increase in that compensation) is to be regarded as the judge's "private property" for purposes of the Fifth Amendment's Just Compensation Clause.[14] In

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[14] Appellant's reliance (J.S. 7-8) on *American Federation of Government Employees (AFGE)* v. *Campbell,* 659 F.2d 157 (D.C. Cir. 1980), cert. denied, 454 U.S. 820 (1981), is equally misplaced. That case also involved salaries, not retirement benefits; the court held that a particular increase in wage levels for federal employees had not become effective as a matter of statutory construction, and it therefore had no occasion to consider whether the Constitution would have barred Congress from rolling back the increase if it had become effective (659 F.2d at 160). Although the court of appeals did not reach the question, this Court elsewhere has made clear that "an act merely fixing salaries of officers creates no contract in their favor and the compensation named may be altered at will by the legislature"

this case, the question is whether the COLA for 1986 became the private property of federal retirees as of December 1, 1985. As we have shown, it did not, and Congress's subsequent suspension and eventual cancellation of that increase therefore did not violate the Fifth Amendment.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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(*Dodge* v. *Board of Education*, 302 U.S. at 78-79). Appellants' reliance on the District of Columbia Circuit's decision in *AFGE* is particularly strained in view of their concession (J.S. 9) that that court's earlier decision in *Stouper* v. *Jones, supra,* is squarely antithetical to their position.

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